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RWQCB-CVR  
FRESNO, CALIF.

September 9, 2013

Mr. Alan Cregan  
California Regional Water Quality Control Board  
1685 E Street  
Fresno, California 93706

**SUBJECT: Public Comment for  
Reissued Waste Discharge Requirements  
General Order for Existing Milk Cow Dairies  
RWQCB Order R5-2007-0035-R**

Dear Mr. Cregan:

Thank you for allowing me an opportunity to provide comments<sup>1</sup> for the Reissued Waste Discharge Requirements General Order for Existing Milk Cow Dairies (Reissued General Order).

I have the following comments and questions with regards to enforcement of the Reissued General Order. As appropriate some back ground information is provided before presenting questions about the Reissued General Order.

## **1. Reissued General Order is inconsistent with the California Constitution**

### **Background**

The California Water Code Section 13267(c)<sup>2</sup> provides the Water Board an ability not a mandate to inspect the facilities for compliance purposes. Inspections can be construed as an invasive abuse of the people's right to privacy<sup>3</sup> and from

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<sup>1</sup> California Constitution ARTICLE 1 SECTION 3(b)(1) "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."

<sup>2</sup> "In conducting an investigation pursuant to subdivision (a), the regional board may inspect the facilities of any person to ascertain whether the purposes of this division are being met and waste discharge requirements are being complied with."

<sup>3</sup> California Constitution ARTICLE 1 SECTION 1. "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

unlawful searches and seizures<sup>4</sup>. Expectations of privacy are greater in rural areas. Dairying is not a crime. Water Code violations are infractions and considered non-criminal in nature. Surely, the legislature did not intend to grant an authority that is inconsistent with the State Constitution, State of California executive order D-78-89, and case law<sup>5</sup>.

## Reissued General Order

### Standard Provisions and Reporting Requirements B. 15

"The discharger shall permit representatives of the Central Valley RWQCB and State Board, upon presentation of credentials at reasonable hours, to :

- a. Enter premises.....
- b. Copy any records.....
- c. Inspect facilities....
- d. Sample....."

Question #1A How can the water board consider invasions of privacy and seizure of property as reasonable when other non-intrusive methods of investigation such as remote sensing and viewing from public roads exist?

Question #1B What specific section in the California Water Code does the State Water Board derive the authority to order a person to waive their inalienable rights to privacy and others protected by the State Constitution?<sup>6</sup>

## 2. Sampling and Reporting of Water Supply wells

### Background

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<sup>4</sup> California Constitution ARTICLE 1 SEC. 13. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

<sup>5</sup> "The right of officers to thrust themselves into a home is also a grave concern not only to the individual, but to a society, which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, **to be decided by a judicial officer, not by a policeman or government enforcement agent.**" Johnson v. United States, 333 U. S. 10, 333 U. S. 14:

<sup>6</sup> "The state cannot diminish rights of the people." Hurtado v. People of the State of California, 110 U.S. 516.

Water supply wells are inadequate for monitoring purposes<sup>7</sup>. Although the water board states that the purpose is to identify trends in water quality for nutrient management purposes<sup>8</sup>, Table-5 of the Monitoring and Reporting program Attachment A clearly indicates the water board intends to use the analytical data from water supply wells as evidence to support investigative and or Clean up and abatement actions under Section 13267 and/or 13304, respectively. The previous General Order indicated that approximately 8 independent samples would be sufficient to evaluate trends in water quality<sup>9</sup>. There are likely sufficient data to establish trends.

Question #2A How will the water board ensure that analytical data which is well documented to be completely inadequate as evidence is not used as such for the purposes of requiring investigation and cleanup under Sections 13267 and 13304?

Question #2B Please explain the rationale for including analytical results and relative distances from agricultural water supply wells in Table 5 of Attachment A.

Question #2C Given trends are likely established that can reasonably be used to effect a nutrient management plan, is the requirement of supplying these data justified? If so, please explain or demonstrate a justification that bears a reasonable relationship to the need for requiring the data.

### **3. Well Setbacks**

#### **Background**

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<sup>7</sup> "This reveals that monitoring conducted from supply wells (alone) does not provide either an accurate or a timely indication of groundwater degradation." AGUA v. RWQCB 210 Cal. App 4<sup>th</sup> 1255.

<sup>8</sup> "The purpose of requiring monitoring of water supply wells includes...." Reissued General Order Information Sheet, p IS-20

<sup>9</sup> "The discharger shall submit to the Executive Officer an evaluation of the groundwater monitoring data within six months of obtaining sufficient data to evaluate trends in the data (usually about 8 independent samples)

General Specification B.7 includes provisions for alternative conservation practices to the 100-foot setback requirement<sup>10</sup>.

Question 3A Is it possible for the water board to quantify the reduction of a particular pollutant that is reportedly achieved by the 100-foot setback?

Question 3B What policies or procedures does the water board use or rely on in determining whether the various technical approaches achieve an equivalent reduction?

Question 3C Does the water board have discretion in selecting alternative technical approaches to the setback requirement for compliance review and approval?

Question 3D Does the water board staff compliance officer have discretion to require a technical report from a discharger and not review and assess the technical report and discharger for compliance purposes? If so, please explain where this discretion is derived from.

#### **4. Persistence of elevated nitrates in groundwater**

##### **Background**

Professional reports suggest that elevated nitrates will continue to persist in groundwater for several decades into the future<sup>[11][12]</sup> even if sources are reduced or eliminated. Further, findings indicate that 96% of the nitrate impacts to groundwater occur from the application of fertilizer to crops. Given the above:

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<sup>10</sup> Manure and process wastewater shall not be applied closer to 100 feet .....unless.... alternative conservation practices or site specific conditions will provide pollutant reduction equivalent or better than the reductions achieved by the 100-foot setback."

<sup>11</sup> "Nitrate problems will likely worsen for several decades. For more than half a century, nitrate from fertilizer and animal waste have infiltrated into Tulare Lake Basin and Salinas Valley aquifers. Most nitrate in drinking water wells today was applied to the surface decades ago." Assessing Nitrate in California's Drinking Water - Overview

<sup>12</sup> "Thus, if the sources of recalcitrant contaminants (nitrates and salinity in the Salinas Valley case) have not diminished appreciably since their introduction starting in the 1940s and 1950s, one can expect steadily declining water quality many decades into the future, even if the sources are reduced or eliminated today." Dispersion of Groundwater Age in an alluvial Aquifer System, Weissman, et al. Water Resources Research, Vol. 38 No. 10; 2002

Question 4A How will the water board distinguish impacts from current land practices from those that occurred decades ago or from sources off-site in determining enforcement actions at dairies?

Question 4B How will the water board modify a schedule for compliance since nitrates concentrations are expected to increase with time.

Question 4C. How does the water board justify significant costs associated with upgrades to wastewater lagoons considering that reducing seepage from these sources are not likely to significantly reduce overall the constituents of concern in groundwater?

## **5 Enforcement Action regarding Notices of Violation**

### **Background**

A notice of violation is the initiation of administrative legal proceedings against a discharger. Too often, dischargers are required to submit data rather than a technical report prepared by a qualified consultant. Although the Water code, the basin plan, the general order and various policies indicate a preliminary assessment be conducted by a qualified professional, the record indicates an abuse of discretion in requirements. In one case, a directive to remediate groundwater was ordered without requiring a workplan or assurance that a professional would be retained by the discharger. In fact, the groundwater remediation was conducted without regard to OSHA and other health and safety requirements. Further, the same case also required a groundwater grab sample without requiring a technical report from a qualified professional. This is particularly disturbing, since the alleged discharge was located in an area known, to the water board but not the discharger, to have background nitrate concentrations far in excess of the MCL.

Question 5 What assurances can the water board provide that future enforcement actions that purport to investigate groundwater will require a qualified professional with experience in hydrogeology?

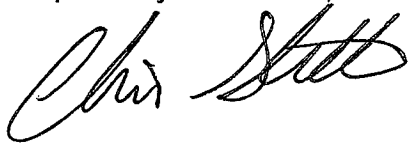
## **6 Purpose of groundwater monitoring**

Throughout the Reissued General Order, the water board indicates that the purpose of requiring groundwater monitoring is to evaluate current management practices to determine if practices are protective of groundwater. However, Section 13360 prohibits the water board from specifying such practices. Groundwater monitoring is typically conducted to define the source and extent of impacts. The Basin plan clearly articulates the nature of control actions to be implemented by the water board. If a potential water quality problem is identified, the next step is confirming and characterizing water quality problems through assessments of source, frequency, duration, extent, fate, and severity.

Comment 6 The purpose of groundwater monitoring as prescribed in the Reissued General Order does not appear to be consistent with the California Water Code or Basin Plan. Please explain how the stated purpose is consistent with the Water code and Basin Plan.

If you have any questions or need additional supporting information, please call (559) 304-6076.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Chris Stett", is written over the "Respectfully Submitted," line.